

STATE OF MICHIGAN
COURT OF APPEALS

COMPUTER NETWORK, INC.,

Plaintiff-Appellant,

v

AM GENERAL CORPORATION and PFEIFFER
INFINITI, INC.,

Defendant-Appellees.

FOR PUBLICATION
February 24, 2005
9:05 a.m.

No. 248966
Kent Circuit Court
LC No. 02-003432-CP

Official Reported Version

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

HOEKSTRA , P.J., (*dissenting*).

Because I would affirm the dismissal of this case, I respectfully dissent.

Regarding plaintiff's claim for breach of an implied warranty of merchantability against defendant AM General, I would hold that summary disposition was appropriately granted. Here, plaintiff leased a model H1 Hummer, which is essentially an off-road military vehicle that is sold to the public. Plaintiff took delivery of this vehicle on June 29, 2000, at which time the Hummer had been driven a total of thirty miles. On August 9, 2000, plaintiff presented the vehicle for its regularly scheduled 3,000-mile service check, and in addition complained only of an air conditioning problem, a loose Velcro strip on the tailgate, and condensation on the dashboard. Ultimately, the vehicle was driven more than 46,000 miles, many of which were off-road, throughout the entire thirty-month lease period. Such use approached the 50,000 miles contemplated in the lease and exceeded AM General's 36,000-mile express warranty. Although this Hummer was undoubtedly less than perfect, its condition shortly after delivery and its extensive use by plaintiff during the period of the lease preclude a finding that the vehicle was defective at delivery. Moreover, even though numerous repairs were necessary, each repair was successfully completed at no cost to plaintiff. Under these circumstances, I conclude that plaintiff is unable to establish that the vehicle was defective when it left the possession of either the manufacturer or the seller. See *Guaranteed Constr Co v Gold Bond Products*, 153 Mich App 385, 393; 395 NW2d 332 (1986). Further, unlike the majority, I find that *Int'l Financial Services Inc v Franz*, 515 NW2d 379 (Minn App, 1994) aff'd in part and rev'd in part on other grounds 534 NW2d 261 (Minn, 1995), in which the plaintiff offered expert testimony indicating that the product at issue there "required an *unusual* amount of service" and suffered an "'unacceptable' amount of 'down' time," is distinguishable. See *id.* at 383 (emphasis added). In this case, however, plaintiff offered no expert testimony regarding whether the Hummer was defective as a

result of the number and type of repairs or the length of time that it was out of service, even though the vehicle was designed for the military and was used off-road.

For the same reasons, I also disagree with the majority regarding whether a question of material fact existed with respect to plaintiff's claim of breach of implied warranty under the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq.*

In all other respects, I agree and join with the majority.

/s/ Joel P. Hoekstra